

TAX APPEAL NO.28/2003

The Commissioner of Income Tax
Having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. Appellant.

V/s.

M/s. Anderson Marine & Sons Pvt. Ltd.,
Zorinto, Sancoale,
P.O.Cortalim, Goa 403 710. Respondent.

Mr. S.R. Rivonkar, Advocate for the appellant.

Mr. N.S. Inamdar, with Mr. R.S. Padvekar and Mr. S.D.
Padiyar, Advocates for the respondents.

CORAM : A.M. KHANWILKAR &
P.V. HARDAS, JJ.

Date of reserving the
Judgment : December 8, 2003

Date of Pronouncing the
Judgment : December 16, 2003

J U D G M E N T : (Per KHANWILKAR, J.)

This appeal under Section 260-A of the Income Tax Act, 1961 is directed against the Judgment and Order passed by the Income Tax Appellate Tribunal, Panaji Bench (SMC) dated March 13, 2003 in I.T.A. No.214/PANJ/2001(ASST.Yr.1999-2000). By this appeal, the Revenue has posed following substantial questions of law to be answered by this Court arising out of the impugned decision :

A) Whether on the facts and circumstances of the case, the ITAT was justified in holding that there was no order u/s 143(1) of the Act, and that the Commissioner has no jurisdiction to revise such an intimation ?

B) Whether on the facts and in the circumstances of the case, the ITAT is justified in setting aside the impugned order u/s 263, on the ground that the intimation u/s 143(1) is not an order revisable u/s 263 of the IT Act ?

C) Whether the findings of the ITAT are contrary to law laid down by the Hon'ble High Court of Bombay in "249 ITR 520" and by the Hon'ble Madras High Court in "261 ITR 754 ?"

Briefly stated, the Respondent (hereinafter, referred to as the "Assessee") is a company incorporated under the provisions of the Companies Act. The assessment year relevant for this appeal is 1999-2000. The Assessee filed its return on 31.12.1999 declaring total income of Rs.4,42,870/- under Section 115-JA for the assessment year in question. The said return was processed under Section 143(1) of the Act, on March, 24, 2000 by the Joint Commissioner of Income Tax (Assessment) Special Range, Panaji. The document annexed as Exhibit A is titled as "Order under Section 143(1) of the Income Tax Act, 1961". The fact remains that this was an assessment under Section 143 (1) of the Act. Subsequently, it was noticed that while computing the books of profit under Section 115 JA, certain prima facie adjustments were not done.

According to the Revenue, the Assessing Officer did not make adjustment under Section 143(1) as with effect from 1.6.1999, prima-facie adjustments were not to be made as there was a ban on selection of cases for scrutiny except with the approval of the Chief Commissioner of the Income Tax as per Board's circular No.1984. In this backdrop, the Income Tax records of the Assessee were examined by the Commissioner when it was noticed that Assessment as made under Section 143(1) was erroneous and prejudicial to the interests of Revenue. In the circumstances, the Commissioner in exercise of power vested under Section 263 of the Act, sought to revise the said Assessment for which opportunity of being heard was extended to the Assessee notifying the proposal of computation of income tax. Suffice it to point out that the prima facie opinion of the Commissioner was that additional 30 % deemed income on the notified items was required to be made which was to the extent of Rs.49,23,078/-. That proceeding was contested by the Assessee. The Commissioner of Income Tax Panaji, Goa, however, for the reasons recorded in his Judgment and Order dated September 3, 2001, was pleased to cancel the assessment under Section 143(1) dated 24.3.2000 and directed the Assessing Officer to undertake assessment afresh under scrutiny after giving the Assessee of opportunity of being heard. That

decision was carried in appeal by the Assessee before the Income Tax Appellate Tribunal, Panaji Bench (SMC). Besides challenge to the findings recorded by the Commissioner on merits, the principal contention raised on behalf of the Assessee in that appeal was that the Commissioner had no jurisdiction to invoke power vested under Section 263 of the Act, for that power could be invoked only against an order passed by the Assessing Officer. The argument advanced on behalf of the Assessee was that in cases of assessment under Section 143(1), in view of the Scheme of Amended provision, which came into effect from 1.4.1989, does not postulate any order to be passed by the Assessing Officer. If that was so, there was no order passed by the Assessing Officer in law, though it was labelled as Order under Section 143(1) of the Act. It was next contended that, under the Scheme of Section 143 of the Act, as applicable to the case of the Assessee for Assessment year 1999-2000, it recognizes only one order under Section 143(3) to be passed by the Assessing Officer, and which alone was revisable under Section 263 of the Act. Whereas, the purport of Section 143(1) of the Act only enables the Assessing Officer to prepare intimation in respect of return furnished by the Assessee under Section 139 or in response to notice under Section 142(1) of the Act. It was contended that

intimation is not an order. On this premiss, it was argued that exercise of power by the Commissioner under Section 263 of the Act, in the fact situation of the present case, was without authority of law. It was also contended that even if intimation sent by the Assessing Officer under Section 143(1) as in this case, was to be treated as an order, even then, action under Section 263 of the Act was unavailable in terms of the circular No.4 dated 8.7.1986 and No.176 dated 26.8.1987. To buttress the above argument, reliance was placed by the Assessee on the decisions reported in 252 ITR 820, in the case of Nazir Singh vs. CIT, of Madhya Pradesh High Court and another decision reported in 210 ITR 567 in the case of CIT v/s. Smt. Prakashwati of the Allahabad High Court. This argument was resisted on behalf of the Revenue contending that intimation issued under Section 143(1) is in the nature of an order and for which reason, it was open to the Commissioner to invoke Section 263 of the Act having noticed that the same was erroneous, as it was prejudicial to the interest of the Revenue. However, the argument canvassed on behalf of the Assessee found favour with the Appellate Tribunal. The reasons recorded by the Appellate Tribunal for accepting the argument of the Assessee can be discerned from para 4 of the impugned decision, which reads thus :

4. After having considered the rival submissions and facts and circumstances of the case, and the decisions as well as the Board Circulars, relied upon by the Counsel for the assessee, I am of the opinion that after the amendment of provisions 143 of the Act with effect from 1.4.1989, there is no provision for making an order of assessment u/s. 143(1) or u/s. 143(a) of the Act. The only order of assessment to be made is u/s. 143(3). So far as the consideration of intimation, send under section 143(1)(a) of the Act as a notice of demand u/s. 156 of the Act is concerned, I am of the opinion that the legislature has intentionally avoided the use of the word "order" in the provisions of section 143(1)(a) and has considered the intimation as deemed demand notice which is only for the purpose of enabling the assessee to file an appeal against such intimation. Since no appeal could be filed without there being a demand notice, it was to remove this hardship, that the legislature provided that the intimation shall be deemed to be a notice of demand but that does not mean that it will partake the character of "order" as envisaged in the provisions of Section 263 of the Act."

It is mainly on this premiss, the tribunal, reversed the order passed by the Commissioner and allowed the appeal preferred by the Assessee. The Revenue has preferred present appeal, raising substantial questions of law, referred to above.

3. We have heard, Mr. Rivonkar, for the appellant-Revenue and Mr. Inamdar, instructed by R.S. Padvekar and Shri. S.D. Padiyar for the respondent Assessee. Mr. Rivonkar contends that the power

bestowed in the Commissioner by virtue of Section 263 of the Act cannot be whittled down on the reasoning given by the Tribunal, while accepting the argument advanced on behalf of the Assessee. According to him, filing of return by the Assessee and sending intimation to the Assessee on the basis of such return being an assessment partakes the colour of an order in that behalf. To support his argument, he has placed reliance on the language of Section 143(1) which provides that intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of the Act shall apply accordingly. He submits that by this legal fiction, intimation sent to the Assessee is a notice of demand under Section 156; And if it is so, having regard to purport of Section 156 of the Act, which provides for issuance of notice of demand in consequence of any order passed under the Act, it will have to be assumed that submission of return under Section 139 by the Assessee and acknowledgement or acceptance thereof by the proper authority itself is a assessment under Section 143(1) of the Act, which amounts to an order passed by the proper Authority (Assessing Officer) in that behalf. He submits that if this argument was to be accepted, it necessarily follows that the Commissioner was competent to invoke Section 263 of the Act. Mr. Rivonkar has

placed reliance on the decision of the Apex Court reported in 243 (2000) ITR 83 in case of Malabar Industrial Company Ltd. Vs. CIT to buttress his argument that no fault can be found with the order of the Commissioner having invoked Section 263 of the Act. Mr. Rivonkar has also relied on the decision of our High Court, reported in 249 (2001) ITR 520 in the case of CIT v/s. Rajkumar Dipchand Phade, which has taken the view that it was open to the Commissioner to invoke Section 263 of the Act in respect of Assessment made under Section 143(1) of the Act. Reliance is also placed on the decision of the Madras High Court reported in 261 (2003) ITR 754 in the case of CIT v/s. Chidambaram Construction Company which has held that the authority empowered to issue instructions is the Board and not the Director of Inspection. Further, instructions which are approved by the Board will bind the Commissioner and not instructions given by any one Member of the Board. This authority was pressed into service to repel the argument advanced on behalf of the respondent, with reference to Departmental Circular No.549 dated 31.10.1989 to which we shall make a reference a little later. On the other hand, Mr. Inamdar for the Assessee has reiterated the argument which has already found favour with the Tribunal referred to above. He submits that there is

perceptible shift after the coming into force of the amended provisions with effect from 1.4.1989 in respect of the procedure for assessment. Inasmuch as, the Assessing Officer is not called upon to pass any order on the return filed by the Assessee under Section 139 or in response to notice under Section 142, by virtue of amended Section 143(1) of the Act. Whereas, the Assessing Officer has to mechanically acknowledge or accept the return so filed, which is end of the matter. In other words, the Assessing Officer is not at all required to apply his mind which is the quintessence to constitute order, but only discharges his ministerial work of acknowledging the return so filed and send intimation on the basis of such return for payment of deficit tax or interest or for refund of excess amount already paid by the Assessee. To demonstrate the distinction between procedure provided for under Section 143(1) and 143 (2) read with 143(3), contends learned Counsel, it is only when the Assessing Officer has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, that the Assessing Officer would resort to procedure provided under Section 143(2) and 143(3) and only thereafter, proceed to pass an order in writing either allowing or rejecting the claim or claims, specified in such notice and make an

assessment determining a total income or loss accordingly and determine the sum payable by the Assessee on the basis of such assessment. It is only when such order is passed, that the same is amenable to be questioned by the Commissioner in exercise of power vested in him under Section 263 of the Act and not otherwise. To demonstrate the above contention, learned Counsel has placed reliance on Section 154 of the Act, which provides for rectification of mistake. That provision makes distinction between an "order" and an "intimation" or "deemed intimation" under sub Section (1) of Section 143. He has also relied on the contents of the Departmental Circular no.549 dated 31.10.1989 which spells out the scope and the effect of the amended Section 143 of the Act. This Circular mentions that the amended provision has done away with the requirement of passing a regular assessment order and it only provides for proper recovery of tax or interest due from the Assessee or issue of refund due to the Assessee on the basis of the return. He has also relied on the decisions of the Allahabad High Court in Smt. Prakashwati's case (supra) and of Madhya High Court in Nazir Singh's case (supra) wherein according to him, it has been held that every order is not revisable under Section 263 of the Act. Learned Counsel submits that even if the intimation under

Section 143(1) is assumed to be an order, even then action under Section 263 was not available in terms of Circular No.4 dated 8.7.1986 and No.176 dated 26.8.1987, which have already been considered in the aforesaid decisions.

4. Before we proceed to examine the rival submissions, we think it apposite to advert to relevant extract of Section 143 (1) of the unamended Act, which prevailed upto assessment year 1988-1989. The same reads thus,

"Old S. 143 (1)(a) upto A.Y. 1988-89.

S. 143 Assessment - (1) (a) Where a return has been made u/s 139 the Assessing Officer may without requiring the presence of the assessee or the production by him of any evidence in support of the return, make an assessment of the total income or loss of the assessee after making such adjustments to the income or loss declared in the returns as are required to be made under Cl.(b) with reference to the return and the accounts and documents, if any, accompanying it and for the purpose of adjustments referred to in Sub-Cl.(iv) of Cl.(b) also with reference to the record of the assessments if any, of past years and determine the sum payable by the assessee or refundable to him on the basis of such assessment.'

5. The amended provision of Section 143(1) of the Act, as applicable w.e.f. from 1.4.1989 i.e. assessment year 1989-90, reads thus:

"New S.143 (1)(a) w.e.f. 1.4.89 ie. A.Y.89-90.

S. 143(1) Where a return has been made u/s 139 or in response to notice u/s. 142.

- (i) If any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then without prejudice to provisions of sub-sec.(2), an intimation shall be sent to the assessee specifying the sum so payable and such intimation shall be deemed to be notice of demand issued u/s 156 and all the provisions of this act shall apply accordingly and
- (ii) If any refund is due on the basis of such returns it shall be granted to the assessee and an intimation to that effect shall be sent to the assessee.

Provided that except as otherwise provided in this sub-section, the acknowledgement of the returns shall be deemed to be an intimation under the sub-section where either no sum is payable by the assessee or no refund is due to the assess."

6. Having considered the rival submissions, the principal question that arises for our consideration is regarding the scope of interference under Section 263 of the Act. That question is no more res integra. The Apex Court in Malbar Ind. Co. Ltd., (supra) has held as under:

A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the

Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of the twin conditions, namely, (1) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act."

7. It is relevant to note that the Tribunal has accepted the argument canvassed on behalf of the Assessee mainly on the reasoning that intimation does not partake the character of an order, as envisaged by the provisions of Section 143 of the Act. It has not based its decision on any other consideration. We shall examine the matter only in that context. The immediate question that arises is, what is the purport of Section 143 of the Act. Indeed, after the amendment of 1989 there has been perceptible shift in the procedure regarding assessment. Section 143(1) is a provision regarding procedure of self assessment. The Assessing Officer has to scrutinize the return as filed by the Assessee and send intimation with regard to deficit tax or interest or for refund as the case may be. The first proviso to sub-Section (1) postulates that even acknowledgment of the return shall be deemed to be an intimation for the purposes of that provision

where either no sum is payable by the assessee or no refund is due to him. The second proviso mandates that no intimation under the said sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made. The scheme of this provision is that the return as filed by the Assessee should be accepted at its face value being self-assessment. However, the said sub-Section is without prejudice to the provisions of sub-Section (2). Sub-Section (2) of Section 143 provides that on furnishing of return, the Assessing Officer has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, he can serve notice on the assessee specifying of such claim of loss exemption, allowance or relief, and require the assessee on the specified date to produce or cause to be produced any evidence or particulars specified therein or on which the Assessee may rely in support of such claim. However, this power by virtue of proviso to sub-section (2) is required to be exercised within 12 months from the end of the month in which the return is furnished. If the Assessing Officer invokes that power, then on further inquiry as referred to in Sub-Section (3), he would make an order in writing allowing or rejecting the claim or claims specified in the notice given to the assessee and make

an assessment determining the total income or loss accordingly. And determine the sum payable by the assessee on the basis of such assessment. Indeed, order passed under sub-section (3) of section 143 is "regular assessment" within the meaning of Section 2(40) of the Act which defines "Regular Assessment" means the assessment made under subsection (3) of section 143 or section 144. Section 2 (40) which defines regular assessment, was amended by the Finance Act, 1990 w.e.f. 1.4.1989, which corresponds to the amendment effected in Section 143(1) of the Act. In other words, the procedure for assessment has been simplified so as to dispense with regular assessment order to be passed by Assessing Officer in every case. The question is, whether acceptance or acknowledgement of return filed by the Assessee and intimation sent for the purpose of Section 143(1) is an assessment ? The answer in our opinion, is in the affirmative. It is nevertheless "assessment". Assessment has been defined in Section 2(8) as assessment includes reassessment. Section 143, as a whole, is a provision regarding assessment. The modalities and procedure for assessment has been provided for in sub-section (1), which is different then procedure under sub-section (2) read with (3) of the same provision. In both cases, it is proceedings under the Act and assessment accepted or

made by the Revenue, as the case may be. In the later case i.e. Section 143(3), an order is passed; whereas in the in the former case i.e. Section 143(1), it is an intimation or acknowledgement. Nevertheless, the intimation sent by the Assessing Officer, in law, will have to be understood as having force of an order on self-assessment. Only this construction would be purposive construction. If the argument of the Assessee was to be accepted that there is no order passed by the Assessing Officer, that would mean that there has been no assessment on the return filed by the Assessee. Such construction would militate against the interest of the Assessee. The construction put by us is reinforced by the legal fiction provided in the amended provision, which postulates that "intimation" shall be deemed to be notice of demand issued under Section 156 and all the provisions of the Act shall apply accordingly. On plain reading of Section 156 of the Act, notice of demand is served upon the Assessee when any tax, interest, penalty, fine or other sum is payable in consequence of any order passed under the Act. To put it differently, issuance of notice of demand (read intimation under Section 143(1) of the Act), presupposes that it is in consequence of an order having been passed under the Act. In that sense "intimation" under Section 143(1) would partake the

colour of an order passed under the Act. Understood thus, interference under Section 263 of the Act by the Commissioner even against intimation referable to section 143(1) is open. We are persuaded to take this view because if the Legislature had intended to exclude jurisdiction of the Commissioner in respect of proceeding under Section 143(1) of the Act, which is also an assessment and, therefore, in the nature of an order, it would have expressly made provision in that behalf, just as it has amended Section 154 of the Act by Finance Act, 1999 in respect of provision for "rectification of mistake" as a consequential amendment made to envelope the amended Section 143(1) of the Act. It will be useful to advert to Section 142 of the Act which enables the Assessing Officer to make inquiry before assessment, after the return of income under Section 139 of the Act is filed by the Assessee. Section 142 precedes Section 143 and is not restricted only to assessment order to be passed within the meaning of Section 143(3) of the Act. In other words, on filing of the return under Section 139, the Assessing Officer if, has reason to believe that inappropriate claim has been made by the Assessee in the return, before sending intimation under Section 143 (1) can make such inquiry and if he is satisfied in that inquiry about the inappropriate claim of the

Assessee, he can proceed in terms of sub-section (2) and sub-section (3) of Section 143. This appears to be the scheme regarding the procedure of assessment of the return filed by the assessee. Accordingly, as already observed by us earlier, in both situations, it is the decision of the Assessing Officer whether to send intimation or to proceed under sub-section (2) of section 143. That is surely a process of taking a decision in the matter. Sending intimation being a decision of acceptance of self-assessment is, therefore, in the nature of order passed by the assessing Officer for the purpose of Section 263 of the Act. In the other situation, the action culminates with the order in writing under Section 143(3) of the Act, which is indubitably amenable to Section 263 of the Act.

8. On the above reasoning, the decisions relied upon on behalf of the Respondent Assessee will be of no avail. The decision in the case of Prakashwati (supra) is on the proposition that no interference under Section 263 is warranted in respect of summary assessment of small assessee. In the first place, in that case the assessment years were 1984-85 and 1985-86, which is prior to amendment of 1989. Secondly, as a fact it was found that in respect of

assessment year 1984-85 the assessee was liable to tax of Rs.80/- while in respect of other year tax liability was of Rs.475/-. The Allahabad High Court relying on the decision of our High Court in CWP v/s. Executor of Late D.P reported in (1991) 189 ITR 389, declined to enter into reference under Section 256(2) of the Income Tax Act having regard to the smallness of the prejudice that was to be caused to the interest of the Revenue. The Court, therefore, found that invocation of power under Section 263 was inappropriate. Even in the case of Nazir Singh (supra) more or less similar position was noticed by the Madhya Pradesh High Court. Inasmuch as, the liability of the payment of the Assessee was only around Rs.1300/-. It is in that backdrop, the Madhya Pradesh High Court took the view that section 263 of the Act was not available and ought not to have been invoked, in such cases. The Madhya Pradesh High Court has referred to Board's Circular No.4 dated July 8, 1986 and 176 dated August 26, 1987 which provide that no remedial action was necessary for summary assessment as the revenue loss, if any, was consciously suffered by the Government in utilizing resources in scrutiny and investigation of larger cases. In that sense, this decision is also of no avail to the respondent. In our view, in the present case, the Tribunal has not based its opinion on the said

circulars as such. On the other hand, having regard to the case as made out by the Commissioner for exercising power under Section 263, that the respondent Assessee was liable to pay income tax to the extent of Rs.49,23,078/- being 30 % deemed income on the specified items, if that case is established, then obviously, it is not a case of smallness of the revenue involved as was the case before the Allahabad High Court and Madhya Pradesh High Court. Although the respondent-Assessee may be justified in contending that the decisions of the Madras High Court in Chidambaram Construction (supra) as well as of our High Court in the case Rajkumar Dipchand Phade case (supra), are not applicable because in those cases, the power was exercised under Section 263 in respect of summary assessment made under unamended Section 143(1) of the Act, however, for the reasons already recorded above, we find no substance in the argument of the Respondent-Assessee and in particular the reasons recorded by the Tribunal in taking the view that the Commissioner could not have exercised jurisdiction under Section 263 in respect of assessment under Section 143(1) as applicable after 1.4.1989.

9. As the Tribunal has proceeded to decide the matter on the solitary ground referred to above, it is

not necessary for us to examine any other contention. On the other hand, we would think it appropriate while setting aside the impugned decision, to remit the case to the Tribunal to decide the same in accordance with law on merit.

10. Accordingly, this appeal succeeds. Decision impugned in this appeal is set aside. The appeal preferred by the Respondent-Assessee before the Income Tax Appellate Tribunal being ITA No.214/PANJ/2001 stands remitted and restored to the file of the Tribunal for being considered in accordance with law, on merit. No order as to costs.

A.M. KHANWILKAR, J.

P.V. HARDAS, J.

ssm.